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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]58

HERBERT E. CALLENDER, JAMES O'CONNOR, LESLIE LEE SMITH,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners pray that writs of *certiorari* issue to review the judgments of the Supreme Court of Florida in the cases of *State of Florida* v. *Herbert E. Callender*, *State of Florida* v. *James O'Connor*, and *State of Florida* v. *Leslie Lee Smith*, entered October 21, 1963, with petitions for rehearing denied December 3, 1963.

Citation to Opinion Below

There were no opinions below at any stage of the case.*

Jurisdiction

The Judgment of the Circuit Court of the Fifth Judicial Circuit in and for Marion County was entered August 24, 1962 (S6; O8; C8). A petition for writ of certiorari was denied by the District Court of Appeals, First District, State of Florida, February 26, 1963 (S79; O75; C77). The Florida Supreme Court dismissed the appeals on October 21, 1963 (S196; O196; C214) and denied the petitions for rehearing on December 3, 1963 (S197; O179; C215).**

The jurisdiction of this Court in each of these cases is invoked pursuant to Title 28, United States Code, Section 1257 (3), petitioners having asserted below and asserting here, deprivation of rights privileges and immunities secured by the Constitution of the United States.

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*Appended below however are the orders of the Circuit Court of the Fifth Judicial Circuit in and for Marion County granting the State's motion to dismiss, which contain the only statement of rationale in the record below. This order in the *O'Connor* and *Smith* cases cites purported violations of the Florida appellate rules, failure to include certain references to book and page numbers of the order appealed from and the submission of a brief four days late. In *Callender* only the former procedural fault is cited. In addition, "through an abundance of caution" the Court dismisses each appeal on its merits.

The petition for rehearing on these procedural issues is relevant and is also included in the appendix. This petition was denied without opinion (S3; C3; O3).

**Time for filing this petition was extended to April 13, 1964 by order of Mr. Justice BLACK dated Feb. 27, 1964.

Questions Presented

On June 16, 1961 the petitioners, travelers on an interstate bus, attempted to use the terminal in Ocala, Florida, notwithstanding the local custom of racial segregation at such facilities. Due to the hostility of a few local residents the petitioners' attempt resulted in a very brief "scuffle," characterized by a State witness as a "minor thing." There was no physical violence, though a local resident did testify that his toe was stepped on while he shoved one of the petitioners. When the petitioners refused a request by a local deputy sheriff to return to their bus, they were arrested for unlawful assembly and subsequently convicted.

Did the arrest and subsequent conviction of petitioners deprive them of rights protected by:

1) the due process clause of the Fourteenth Amendment in that they were convicted without any evidence of guilty conduct;

2) the due process clause of the Fourteenth Amendment in that they were convicted under a statute which, as interpreted, was so vague and indefinite as to afford no ascertainable standard of criminality;

3) the due process and equal protection clauses of the Fourteenth Amendment in that their arrests and convictions constituted enforcement of racial segregation.

4) the due process clause of the Fourteenth Amendment, as it guarantees the First Amendment protection of freedom of expression, assembly and religion;

5) Title 49, U. S. C., Section 316(d), which prohibits discrimination in terminal facilities of bus companies operating in interstate commerce?

Was the arrest and conviction of the petitioners an unlawful burden on interstate commerce?

Statutory and Constitutional Provisions Involved

Each of these cases involves Section 1 of the Fourteenth Amendment and Article I, Section 8 of the United States Constitution.

Each petitioner was convicted under the Florida Statutes, Section 870.02:

> If three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months or by a fine not exceeding $500.00.

Each case also involves Title 49, U. S. C. §316(d):

> * * * It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; * * *

Statement

The three petitioners in these actions were convicted by juries, in three separate trials*, of violating Section 870.02 of Florida Statutes, which provides as follows:

> If three or more persons meet together to commit a breach of the peace or do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months or by a fine not exceeding $500.00.

The alleged criminal activity of the defendants arose out of their participation in what the prosecution and the State's witnesses described as a "freedom ride" (*e.g.*, S93, 94, 95, 97, 99; C95, 96; O86, 96), although there was no dispute that petitioners were passengers on a regularly scheduled interstate Greyhound bus en route from Washington, D. C., to St. Petersburg, Florida (S142).

There is actually very little dispute as to the details of the occurrence, as they were elucidated in each of the three trials by both prosecution and defense witnesses. The interstate bus on which all three petitioners were passengers arrived at the bus terminal at Ocala, in Marion County,

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*Each of the trials was of only one of the three petitioners, although the State of Florida presented essentially the same evidence in the prosecution of each petitioner. In order to avoid lengthy repetition of this evidence with respect to each petitioner, the facts are set forth herein but once with supporting reference made to each of the three transcripts. Where one of the transcripts varies from the remaining two, that fact and the nature of that variance are noted.

The references in the Statement are by page number of the transcript, preceded by the last-name initial of the defendant in that prosecution, *i.e.*, S (petitioner Smith); O (petitioner O'Connor); C (petitioner Callender).

Florida, at approximately 12:30 in the afternoon of June 16, 1961 (S91; C90; O85). The bus terminal at Ocala has the usual facilities of a public transportation terminal: parking area for busses, restaurants (in this case, both "white" and "colored" (C91) baggage room, waiting room, rest rooms, and the like (C91)).

Shortly after the arrival of the bus, Deputy Sheriff H. A. Geiger, of the Marion County Sheriff's Office, who happened to be in the waiting room of the bus terminal at the time because "we had advanced notice of what time the busses were arriving, coming into Ocala with freedom riders" (O86; *cf.* S93; C88), heard what he described as "loud words" (O87; C91) or "loud talk" (S92). Although Deputy Geiger testified in the O'Connor prosecution that he could not "recall the exact words" (O103), he testified in the subsequent Callender prosecution that he remembered "something about 'get out of here' or something" (C92).

Deputy Geiger turned his attention to the source of these "loud words" and saw that they issued from a group of "6 or 7 people just inside the [west] door [of the terminal]." (S92; *cf.* C92; O87). He further testified that as he turned his attention to the source of the "loud talk," "I seen a couple of men somewhat tussling, their arms—one pushed the other or something" (S92); "I seen some shoving between a white person and a colored person * * *" (C91; O87). Geiger and other State's witnesses identified the persons comprising this group of "6 or 7" persons as the petitioners Smith, O'Connor and Callender; and three residents of Ocala or environs, namely John H. Owens, T. W. Penuel and J. A. Windsor.

Deputy Geiger immediately approached the group, which was some fifteen feet from where he was stationed (S92), and "asked them what was wrong" (S92; *cf.* O87; C93).

He testified that words were being exchanged between the petitioner Smith and Owens (C93), the latter of whom Geiger described as "a little angry" and as responsible for "the most violent language * * * the loudest language and most angry language" (O103). The substance, if not the color of that language was described by Geiger: "At that time Owens says that this man [Smith] had stepped on his foot and he demanded an apology and he said something about 'nigger' " (C107; *cf.* S96; O87).

Smith's languge, however, was at no time related or characterized by Geiger. Nor was Geiger able to describe in any detail any other action or activity of any of the three petitioners at the time he approached the group of 6 or 7 persons. In fact, Geiger specifically acknowledged that he did not see the petitioner Smith "scuffling" or placing his hands on anyone (S100). Similarly, he "couldn't say" what the petitioned Callender was doing during the alleged "scuffle" (C93). And although he did testify that he saw the petitioner O'Connor in physical contact with Owens, he could only say that O'Connor's arms were where "they possibly shouldn't have been" (S111). Yet Geiger at the same time said that Owens' arms were where "they possibly shouldn't have been" (S111); and in the prosecution of O'Connor, Geiger described O'Connor's arms as being "underneath Owens' arms" (O87; O103), while both of Owens' hands were on O'Connor's chest (O103).

Deputy Geiger, in fact, candidly acknowledged the entire occurrence, which lasted only a few seconds, as "nothing serious" (S95) and as a "minor thing" (S100). Moreover, there were no further incidents after Geiger had approached the group to ask "what was wrong" (O104).

Nevertheless, immediately upon approaching the group thus assembled just inside the door of bus terminal, Geiger ordered the entire group to go outside (S96; O96). Once

outside, Geiger ordered the three local residents to leave the station premises (O88; S94). They did leave the premises proper, but took up positions in front of a tavern across the street (O108; C99). Penuel, one of the three men, returned a short time later, but was again ordered to leave, and was escorted off the premises (to his automobile parked across the street) by a police officer (O89; C99 to 100; *cf.* S105).

Deputy Geiger also instructed the three petitioners "to get back on the bus and remain there until it left Ocala" (O88). O'Connor, apparently speaking for the three of them, said to Geiger "that he was an I.C.C. passenger. He had just arrived on the bus. They were hungry, he said, we are hungry, we want to go in and eat" (O99; *cf.* S106). However, Geiger was adamant: "I told them that they could not eat in Ocala. They would have to eat someplace else. They couldn't eat in the bus station" (S109; *cf.* S99; O99; C94). When the petitioners persisted in their demand to be permitted to use the public facilities of the bus station and refused either to board the bus or leave the premises, Deputy and Sheriff Geiger placed them under arrest.

Deputy Geiger was candid in his description of his reasons for ordering all six persons to leave the terminal building: "All I knew is that they were all together; they were in this group, there was a possibility of violence, there were several people at the Bus Station and I wanted to get them outside so I could talk with them" (C93 to 94; *cf.* S95; O97 to 98). When interrogated as to the basis of his apprehension of violence arising from this "minor incident," Geiger described "information" he had received prior to the arrival of the bus in Ocala "that some man had been down previously making a statement that no more damn niggers would have, would eat here today" (O97); and further relied on "the atmosphere of that particular day, that

time * * *" (O98; *cf.* C98; C102; A95). Geiger, in fact, at one point specifically referred to *Owens'* conduct as providing the impetus for his actions: "Owens was a little angry so, at that time, to keep any other people from congregating and to prevent any trouble, I asked all of them to leave" (S96).

Not only did Geiger fail entirely to attribute his "apprehension" to any words or actions of the defendants (other than the simple fact of their presence), but in answer to a question posed on cross-examination as to the reason for requiring the defendants to board the bus after Owens, Penuel and Windsor departed, Geiger frankly described the compelling "danger" then existing: "If I had let these three stay there, the other three walking down the street turned around and seen them, in all probability they would have returned" (S105).

The State of Florida also called as a witness in all three prosecutions Sheriff Doug Willis of Monroe County, and Deputy Geiger's superior. Sheriff Willis was also at the scene because of "information" he had that "freedom riders" would be arriving in Ocala (S113; cf. O114; C111); he too observed the "scuffle" (S114; O114; C112) and helped to disperse the alleged participants (S114; O114; C114); he too directed the petitioners to leave the premises or board the bus (S115; O117; C115) and prohibited their reentry of the terminal (S115; O118; C126). Although Sheriff Willis' testimony to that extent supported that of Geiger, it added no significant details of the occurrence. Sheriff Willis also testified that Smith was not involved in any "fight" or "struggle" with anyone (S119); he testified that he did not see Callender "with his hand on anyone" (C120); and even testified that he did not see O'Connor in contact with Owens (O120), although he did see O'Connor's hands on Smith (C120). In fact, Sheriff Willis

acknowledged that all he heard was "some voices in a jumble" (C113) and that, as to the "scuffle," "I couldn't tell just exactly what was going on" (O114); "I didn't see it well enough to see what actually took place" (S115).

The many gaps in the testimony of Sheriff Willis and Deputy Sheriff Geiger were filled by John Owens, one of the three local men identified by Willis and Geiger as being involved in the "scuffle," who testified for the State in all three prosecutions.

Owens testified that he and Penuel were inside the terminal and were walking toward the west door, intending to leave (S127; O127). As they approached that door, the petitioners Smith and O'Connor entered the terminal through the west door. What transpired then was frankly stated by Owens on direct examination:

> "Well, I was starting out the west door of the waiting room and I met the fellow, Smith at the door, opened the door and walked right in, and he walked into me and stepped on my foot, and then in moving or something, why, O'Connor, he come up from—well, there was a little commotion, I don't know just exactly, I would say I probably shoved Smith a little bit, or something and then O'Connor grabbed him by the arm, and it looked like he was trying to push him into me." (O127)

> "Yes, I was angry a little bit and started to shove him outside. I believe I asked him to go outside." (S121)

See also C152.

Owens on several occasions acknowledged that he had "shoved" Smith (S127; S131; O121; O128), but despite persistent questioning he stated that he did not see the petitioner Callender touch anyone (C154); that his only

physical contact with Smith was Smith's stepping on his foot and Owens' retaliatory shove (S127 to 128); and that O'Connor, in "grabbing" *Smith* by the arm when he was pushed by Owens, may have struck Owens' arm (O127), although he later acknowledged that he "wasn't sure" (O132). Owens also testified as to a "little shove" by O'Connor as the entire group was being ushered out of the building by Deputy Geiger (O132), although he acknowledged that Geiger was "pushing" the entire group out the door (O133).

The only other descriptions of the occurrence from the State's witnesses came from T. W. Penuel and J. A. Windsor, the remaining two local men involved in the "scuffle" (Both Penuel and Windsor testified against Smith; Windsor testified against Callender; neither was called in O'Connor.) Neither of those witnesses could describe any particular activity of any of the individual petitioners, although Penuel acknowledged that Owens seemed to have a "hold on" Smith (S135), and Windsor heard "Mr. Owens tell him to get out on the outside" (S139).

Petitioner Smith, the first of the petitioners to be tried, took the stand in his own defense. His testimony was not greatly at odds with that of the State's witnesses, except that he denied having stepped on Owens' toe. Smith testified rather that as he and O'Connor entered the bus terminal to eat (S142) (Smith then suffering from an ulcer (S143)) Owens blocked their entry into the Station (S142), advancing on them with his hands raised and saying "no niggers in this place" (S143). He did support Owens' statement that O'Connor and he backed up and that O'Connor put his hands on him (i.e., Smith) at that time (S143; S171).

On the basis of the testimony summarized above, the three petitioners were separately convicted in jury trials and sentenced as follows: Smith, 30 days and a $500.00 fine or in default of fine, an additional six months; O'Connor, $250 fine or, in default, 90 days; Callender, six months and a fine of $300, and in default of fine, an additional six months.

How the Federal Questions were Raised and Decided Below

Petitioners moved unsuccessfully at the completion of the evidence for directed verdicts (O137; S183; C201) because, *inter alia,* "the duty of the law enforcement officers [is] to protect an individual in the exercise of his constitutional rights, not to stop them from exercising them * * *" (S186). Motions for a new trial were made following the verdicts (O59; S56; C56) citing violations of the equal protection clause of the Fourteenth Amendment, 49 U. S. C., Section 316(d), and the Florida Bill of Rights as well as non-constitutional errors. The motions were denied.

On the petitioners' appeal, the Circuit Court of the Fifth Judicial Circuit of Florida in and for Marion County passed on the constitutional claims by rejecting them summarily and completely (O8; S6; C8).

The Florida District Court of Appeal, First District, denied certiorari (O75; S79; C77) and the Florida Supreme Court dismissed the appeals (O196; S196; C214) and denied the petition for rehearing (O179; S197; C215).

Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

ARGUMENT

POINT I

The convictions below violate the constitutional guarantee of due process of law.

A. The convictions were totally unsupported by the evidence.

The petitioners were convicted below, because, in the language of the complaint, they allegedly "did unlawfully meet" with one another "to commit a breach of the peace" contrary to the provisions of Florida law.

The State of Florida does not formally attempt to question the petitioners' right to use the terminal facilities. Rather, the State's thesis is that the attempt to enter the terminal was clouded by an underlying criminal purpose to commit a breach of the peace.

Yet the record, viewed most favorably toward the State, reveals no evidence of any violation of law. Deputy Sheriff Geiger heard "loud words" (O87; C91) or "loud talk" (S72) from "6 or 7 people just inside the door [of the terminal]" (S92; cf. O87). What followed included a "shoving" incident between one of the petitioners and a local resident (C91; cf. O87) and an incident in which one of the petitioners possibly stepped on the toe of another local resident. This, in summary, is the extent to which the peace was threatened. The "possibility of violence" referred to by Deputy Geiger (C93-94) turns out to be whimsical in the absence of a single reference to an event even suggesting violence.

What tension was present was spawned by local area residents. This is clear even according to the State's version of the case. Deputy Geiger testified quite candidly:

"Owens was a little angry so, at that time, to keep any other people from congregating and to prevent any trouble, I asked all of them to leave." (S96)

Owens himself acknowledges, "Yes, I was angry a little bit and started to shove him outside. I believe I asked him to go outside" (S121).

Further, whatever the source, the danger of violence or civil disturbance was wholly imaginary. When Deputy Geiger walked over to the scene of the "breach of the peace" he found that the burning issue was whether or not petitioner Smith would apologize to local resident Owens for having stepped on the latter's toes. (According to the testimony of petitioner Smith the entire incident arose when Owens blocked the entry of the group into the terminal.) Geiger characterized the scuffle as "a minor thing," hardly a sufficient basis upon which to find that the three petitioners met together to create a breach of the peace.

On the basis of such a record, the conviction is contrary to due process of law. *Thompson* v. *Louisville*, 362 U. S. 199. As in *Garner* v. *Louisiana*, 368 U. S. 157 and *Taylor* v. *Louisiana*, 370 U. S. 154, the evidence established simply that petitioners were peacefully exercising their lawful rights in violation of the wishes of local residents. Deputy Geiger gives away the entire charade when he reveals that he ordered the petitioners to reboard the bus so that the local residents involved in the "scuffle" who had left the scene would not return. Not only did the State fail to prove any breach of the peace during the height of the "minor thing" but the petitioners' arrests were admittedly grounded on an alleged fear that others would regard the use of the terminal facilities as a reason to cause trouble.

The State may not justify its supposed fears of violence by reliance upon the wrongdoing of those bent on destroy-

ing the constitutional rights of others. As this Court said last term in *Wright* v. *Georgia*, 373 U. S. 284, 293 "'the possibility of disorder by others cannot justify the exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present.'" The wrongdoing of one cannot justify denying the rights of others. *Cooper* v. *Aaron*, 358 U. S. 1, affirming 257 F. 2d 33, 38-39 (8 Cir. 1958); *Watson* v. *City of Memphis*, 373 U. S. 526. We can say no more than was said by Judge Brown in *Nesmith* v. *Alford*, 318 F. 2d 110, 121 (5 Cir. 1963):

> "'• • • liberty is at an end if a police officer may without warrant arrest not the persons threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and legally and constitutionally protected, is deemed offensive and provocative to settled social customs and practices. When that day comes • • • the exercise of [First Amendment Freedoms] must then conform to what the conscientious policeman regards the community's threshold of intolerance to be.'"

It requires little subtlety to appreciate that the State's theory below, if sanctioned, could abruptly halt the exercise of constitutional rights since a finding of threatened violence—whatever the source of such violence—would justify preventive police action. Violence is thus honored, not condemned.

If State officers do not have the duty to ensure the protection of the rights of all within the State, then at the very least the State may not stand idly by and later prosecute those who exercise their rights because without police help such exercise might lead to violence.

On the present record there is no evidence of any wrongdoing by the petitioners. Here, as in *Wright* v. *Georgia*, 373 U. S. 284, 285, "The record is devoid of evidence of any activity which a breach of the peace statute might be thought to punish."

B. The Florida statute was, as applied to these petitioners, vague, uncertain and indefinite.

Section 870.02 of the Florida Statutes, as it was applied and interpreted below, is so vague as to violate well established principles of due process.

A statute that permits a conviction for unlawful assembly where even the State's witnesses can show nothing more than an apparent insult to local sensibilities actually leaves the job of legislating standards of conduct to the local policeman.

No other conclusion ensues from the facts in this case. The petitioners sought to use a bus terminal serving the public; they found the door to the facility effectively blocked by local residents and still managed to pursue their rights peaceably—even in the eyes of the State's witnesses.

What motivated Sheriff Geiger to conclude under these circumstances that the petitioners had committed a breach of the peace? Geiger had on the day in question heard someone make a statement that (as related at trial by Geiger) "no more damn niggers would have, would eat here today" (O97) and this, plus "the atmosphere of that particular day" (O98) caused "apprehension". When the incident, such as it was, occurred, Geiger could point to no disturbance of the peace caused by any petitioner. A statute that may be shaped according to the needs of the constabulary does not give fair notice of what human conduct is sought to be governed. As was said in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, "no one may be required at peril

of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what crimes are forbidden." And see *United States* v. *L. Cohen Grocery*, 255 U. S. 81, 89; *Connally* v. *General Const. Co.*, 269 U. S. 385; *Raley* v. *Ohio*, 360 U. S. 423.

Here the State of Florida has gone far beyond even the broad interpretations customarily given to the term breach of the peace, see *e.g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296; *Edwards* v. *South Carolina*, 372 U. S. 229, and has permitted its unlawful assembly enactment to become a transparent device for extending its police power into constitutionally sacred ground.

Regrettably there are no reported decisions shedding light on §870.02 of the Florida Statutes. A pertinent law review article, " 'Sit-In' Demonstrations: Are They Punishable in Florida?" 15 Univ. of Miami L. Rev. 123 (1960) cites no Florida decisions but sets down what it considers to be guidelines within which a "sit-in" is legal in Florida and beyond which a breach of the peace is committed by the demonstrators.* The authors believe that "an imminent danger of a riot or a breach of the peace" would justify the arrest of demonstrators who refuse to desist even if they themselves are innocent. Id. at 129. We cannot consider this view to be consistent with federal constitutional

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*The Statute considered is §877.03, not 870.02, but the article's authors point out that the two sections cover much of the same ground. §877.03 states:

> "Breach of the peace; disorderly conduct—whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor, and subject to punishment as provided by law."

principles; see, *e.g.*, *Wright* v. *Georgia*, 373 U. S. 284.* Nevertheless what Florida has done in the present case is even a graver threat to human liberty—it has sanctioned arrest and prosecution on the basis of no governing criteria whatever.

Further, where, as here, the actions obstructed by a vague and arbitrary enactment are truly acts of self-expression since they reassert the dignity and very humanity of the actors the proscription against vague restrictive penal laws must be at its strongest. *Cantwell* v. *Connecticut*, 310 U. S. 296, 308-311; *Scull* v. *Virginia*, 359 U. S. 344; *Watkins* v. *United States*, 354 U. S. 178; *Herndon* v. *Lowry*, 301 U. S. 242, 261-264.

POINT II

The arrests and convictions below constitute *de facto* enforcement of racial segregation in a bus terminal serving interstate commerce in violation of the Constitution and Federal Statutory Law.

There is little mystery connected to the curious turn of events which brings the three petitioners here as convicted criminals for wanting to use an interstate travel facility. This is a clear attempt by a State to enforce segregation through use of its routine criminal process.

The desire of local residents at the station to maintain the custom of segregation is not and cannot be questioned. The petitioners found a bus terminal in Ocala fully set up for the segregation of the races. Despite an attempt to suggest that no racial issue prevailed because of an earlier mixed use of the terminal (C96; 097; S99 to 100), separate facilities still existed (e.g., C91).

---

*And see *Abernathy* v. *Alabama*, No. 575 this term.

The petitioners not only failed to gain access to the facility on an integrated basis but found that what they had really done was to "meet together to commit a breach of the peace". This Court has previously seen through such a flimsy and ingenuous ruse. If a law is used to enforce racial segregation it matters little what it is called. The present attempt to shape innocent conduct to fit the behavior pattern of the rowdy or the drunk cannot misdirect the eye from a segregated bus terminal.

Since the enforcement of racial segregation in facilities serving interstate commerce is a denial of equal protection of the laws* and a violation of a federal statute forbidding discrimination in facilities operated by interstate motor carriers, 49 U. S. C. §316(d)** the respondent has sought to accomplish the same result through the oppressive use of State criminal process.

This kind of federal question is always difficult because it raises the issue of the integrity of state action, beyond the usual issue of the conformity of the State to Constitutional principles. The exercise of Constitutional rights in areas where local hostility is great enough to shape the course of state action makes the necessity to face such questions overwhelming.

The present case is an example of utter failure to adhere to the principles of criminal justice. Not even the witnesses for the State can espouse juridical indignation but rather confess quite openly that the prosecution below

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Bailey v. *Patterson*, 369 U. S. 41; *Turner* v. *Memphis*, 369 U. S. 350; *Gayle* v. *Browder*, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala. 1956); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5 Cir. 1961); *Boman* v. *Birmingham Transit A.*, 280 F. 2d 531 (5 Cir. 1960).

**Boynton* v. *Virginia*, 364 U. S. 454, As to Article I, §8 of the Constitution see *Morgan* v. *Virginia*, 328 U. S. 373.

was based on "loud words" and a "minor incident." Such events—and the absence of any colorable basis for prosecution—indelibly mark the action of the State as the enforcement of racial segregation.

CONCLUSION

The convictions below, without evidence and devoid of any constitutional purpose, must fall. The issue is not simply the rights of these petitioners but the power of a state to circumvent the solemn command of the Constitution.

It is respectfully submitted that the petitions should be granted.

CARL RACHLIN,
FLOYD MCKISSICK,
CHARLES OLDHAM,
WEBSTER SWEET,
ERNEST FINNEY,
and
ERNEST JACKSON,
Attorneys for Petitioners.

GEOFFREY GAULKIN,
BENSON D. SCOTCH,
Of Counsel.

APPENDIX A

Order and Judgment of the Trial Court (Re: *State of Florida* v. *Herbert Ebenezer Callender*).

IN COUNTY JUDGE'S COURT
MARION COUNTY, FLORIDA

STATE OF FLORIDA

vs.

HERBERT EBENEZER CALLENDAR,

Defendant.

PLEA, VERDICT, JUDGMENT AND SENTENCE

PLEA: Not Guilty

VERDICT: Guilty

JUDGMENT: Guilty as charged

SENTENCE: It is considered, ordered and adjudged that Herbert Ebenezer Callender be confined to the Marion County Jail for a period of 6 months and pay a fine of $300.00, in default of payment of said fine he shall be confined to the County Jail for an additional period of 6 months.

Done, Ordered and Adjudged in open Court this 22 August 1961.

LEWIS O. MYERS, JR.
(Seal)
County Judge

APPENDIX B

Order and Judgment of the Trial Court (Re: *State of Florida* v. *James Richard O'Connor*)

IN COUNTY JUDGE'S COURT
MARION COUNTY, FLORIDA

STATE OF FLORIDA

vs.

JAMES RICHARD O'CONNOR,

Defendant.

PLEA, VERDICT, JUDGMENT AND SENTENCE

PLEA: Not Guilty

VERDICT: Guilty

JUDGMENT: Guilty as charged

SENTENCE: It is considered, Ordered and adjudged that James Richard O'Connor is guilty as charged and that the defendant do pay to the State of Florida a fine of $250.00 which amount shall include costs, and in default of the payment of said fine that said defendant be confined in the County Jail of Marion County, Florida, for a period of 90 days and be employed at hard labor.

Done, Ordered and Adjudged in open Court this 17 July 1961.

LEWIS O. MYERS, JR.
(Seal)
County Judge

APPENDIX C

Order and Judgment of the Trial Court (Re: *State of Florida* v. *Leslie Lee Smith*)

IN COUNTY JUDGE'S COURT
MARION COUNTY, FLORIDA

STATE OF FLORIDA

vs.

LESLEY LEE SMITH,

Defendant.

PLEA, VERDICT, JUDGMENT AND SENTENCE

PLEA: Not Guilty

VERDICT: Guilty

JUDGMENT: Guilty as charged

SENTENCE: It is considered, Ordered and Adjudged that Lesley Lee Smith be confined to the Marion County Jail for a period of 30 days and pay a fine of $500.00; in default of payment of said fine he shall be confined to the County Jail for an additional period of 6 months.

Done, Ordered and Adjudged in open Court this 17 July 1961.

LEWIS O. MYERS, JR.
(Seal)
County Judge

APPENDIX D

Order of the Circuit Court of the Fifth Judicial Circuit of Florida in and for Marion County Granting the State's Motion to Dismiss (Re: *James O'Connor v. State of Florida*)*

(Filed—August 24, 1962)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY

JAMES O'CONNOR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE COUNTY JUDGE'S COURT IN AND FOR MARION COUNTY.

This cause on the 6th day of August, 1962, came on to be heard upon Appellee's Motion to Dismiss Appeal for failure of the Appellant to perfect his appeal in accordance with the requirements of the Florida Appellate Rules. Appearing at the hearing for the Appellee, STATE OF FLORIDA, was the State Attorney of the Fifth Judicial Circuit of Florida, Gordon G. Oldham, Jr., and appearing for the Appellant, JAMES O'CONNOR, was his attorney, Ernest

*Identical in the Smith case.

Appendix D

D. Jackson, Sr. At said hearing the Appellant's attorney stated that he had petitioned the court for an additional period of time to file his brief, the time for filing Appellant's brief under Rule 6.11 (b) being within thirty days after the filing of the transcript of record. Under Rule 3.7 (d) additional time may be granted for filing of briefs, provided there is a petition and an appropriate court order extending the time. A Motion for Extension of Time to File Brief in the above styled case does not appear in the record. The record fails to reflect any order from any court granting additional time for Appellant to file his brief under Rule 3.7 (d), or as provided by Rule 6.61. The brief in the above entitled cause should have been filed on or before the 5th day of October, 1961, which is thirty days after the transcript of record was filed by the Appellant on the 5th day of September, 1961. The records reflect that the Appellant's brief was filed on the 9th day of October, 1961, a period of four (4) days later than the maximum time under Rule 6.11 (b) of the Florida Appellate Rules.

Appellant's Notice of Appeal omits the book and page number of the public records in which the order, judgment or decree is appealed from. Florida Appellate Rule 3.2 (c) states that the Notice of Appeal shall state the book and page number of public records in which it is recorded. In applying Florida Appellate Rule 6.1 and Rule 6.4 with Florida Appellate Rule 3.2, it is the Court's belief that the Notice of Appeal in the above styled case should state the book and page number of the judgment which is appealed.

On two previous occasions the Appellee, through its attorney, has moved to dismiss this appeal for failure of Appellant to follow the Florida Appellate Rules. On the first occasion Appellant had served the County Prosecuting Attorney with all documents, rather than the State Attorney

of the Fifth Judicial Circuit, State of Florida, who is counsel for the State in the Circuit Court. At said hearing, as reflected by the order in the above styled cause, it was the Court's opinion that the State Attorney should have been served rather than the County Prosecuting Attorney. However, in fairness to the Appellant, said Court denied said motion to dismiss and gave the Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida, Appellant, rather than serve the State Attorney as directed in said order, served the Assistant State Attorney of the Fifth Judicial Circuit of the State of Florida, and once again; this Court denied the motion to dismiss by Appellee and gave the Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida.

It is the opinion of the Court that Appellant has neglected and failed to comply with the appropriate appellate rules; that such non-compliance has been flagrant, evidencing either ignorance of the rules or an indifference to a conscientious effort to effect compliance. It is now, therefore

ORDERED, ADJUDGED AND DECREED that the above Appeal be and the same is hereby dismissed under Florida Appellate Rule 6.13 for Appellant's failure to prosecute this appeal as required by the rules of appellate procedure.

However, through an abundance of caution, in order that the rights of the Appellant may not be unduly prejudiced, the Court has examined the record and briefs tendered by the Appellant herein and finds his appeal to be without substantial merit. It is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the Circuit Court of the Fifth Judicial Circuit of Florida, in

and for Marion County, shall file with the Clerk of the trial court a certified copy of this Order of Dismissal.

DONE AND ORDERED at Ocala, Marion County, Florida, this 24th day of August, A.D. 1962.

/s/ D. R. SMITH,
Circuit Judge.

I HEREBY CERTIFY that on the 24th day of August, 1962, I mailed a copy of this Order to each of the below addressees:

/s/ R. D. SMITH,
Circuit Judge.

Addressees:

HON. GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit
Kilgore Building
Leesburg, Florida.

MR. ERNEST D. JACKSON, SR.
410 Broad Street, Suite #208
Attorney at Law
Jacksonville 2, Florida.

APPENDIX E

Order of the Circuit Court of the Fifth Judicial Circuit of Florida in and for Marion County Granting the State's Motion to Dismiss (Re: *Herbert Ebenezer Callender* v. *State of Florida*)

(Filed—August 24, 1962)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY

HERBERT EBENEZER CALLENDER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE COUNTY JUDGE'S COURT, IN AND FOR MARION COUNTY

This cause, on the 6th day of August, 1962, came on to be heard upon Appellee's Motion to Dismiss Appeal for failure of the Appellant to perfect his appeal in accordance with the requirements of the Florida Appellate Rules. Appearing at the hearing for the Appellee, State of Florida, was the State Attorney of the Fifth Judicial Circuit of Florida, Gordon G. Oldham, Jr., and appearing for the Appellant, Herbert Ebenezer Callender, was his attorney, Ernest D. Jackson, Sr.

Appellant's Notice of Appeal omits the book and page number of the public records in which the order, judgment

or decree is appealed from. Florida Appellate Rule 3.2 (c) states that the Notice of Appeal shall state the book and page number of the public records in which it is recorded. In applying Florida Appellate Rule 6.1 and Rule 6.4 with Florida Appellate Rule 3.2, it is the Court's belief that the Notice of Appeal in the above styled case should state the book and page number of the judgment which is appealed.

On two previous occasions the Appellee, through its attorney, has moved to dismiss this appeal for failure of Appellant to follow the Florida Appellate Rules. On the first occasion Appellant had served the County Prosecuting Attorney with all documents, rather than the State Attorney of the Fifth Judicial Circuit, State of Florida, who is counsel for the State in the Circuit Court. At said hearing, as reflected by the order in the above styled cause, it was the Court's Opinion that the State Attorney should have been served rather than the County Prosecuting Attorney. However, in fairness to the Appellant, said Court denied said motion to dismiss and gave Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida. Appellant, rather than serve the State Attorney as directed in said order, served the Assistant State Attorney of the Fifth Judicial Circuit of the State of Florida, and once again, this Court denied the motion to dismiss by Appellee and gave the Appellant additional time to serve the proper party, the State Attorney of the Fifth Judicial Circuit of the State of Florida.

It is the opinion of the Court that Appellant has neglected and failed to comply with the appropriate appellate rules; that such non-compliance has been flagrant, evidencing either ignorance of the rules or an indifference to a

conscientious effort to effect compliance. It is now, therefore

ORDERED, ADJUDGED AND DECREED that the above Appeal be and the same is hereby dismissed under Florida Appellate Rule 6.13 for Appellant's failure to prosecute this appeal as required by the rules of appellate procedure.

However, through an abundance of caution, in order that the rights of the Appellant may not be unduly prejudiced, the Court has examined the record and briefs tendered by the Appellant herein and finds his appeal to be without substantial merit. It is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Marion County, shall file with the Clerk of the trial court a certified copy of this Order of Dismissal.

DONE AND ORDERED at Ocala, Marion County, Florida, this 24th day of August, 1962.

/s/ D. R. SMITH,
Circuit Judge.

APPENDIX F

Petition for Rehearing Following Order of the Circuit Court of the Fifth Judicial Circuit of Florida (Re: *Herbert Ebenezer Callender* v. *State of Florida*)*

(Filed—September 10, 1962)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY

HERBERT EBENEZER CALLENDER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Appeal from County Judge's Court, in and for Marion County

To the Honorable Judges of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Marion County:

Petitioner, Herbert Ebenezer Calender, files this, his petition for rehearing, respectfully requesting this Honorable Court to reconsider its Order of Dismissal filed herein on August 24, 1962. As grounds for rehearing, he respectfully suggests the following:

*Petitions in *Smith* and *O'Connor* are identical.

Appendix F

1. The Court apparently overlooked Florida Appellate Rule 6.1 which provides as follows:

> "Appeals and criminal cases to the Supreme Court, the District Courts of Appeal and to the Circuit Courts (including appeals from Municipal Courts), shall be prosecuted in accordance with Part VI of these rules and, except as herein stated, with such provisions of other parts of these rules as are not inconsistent with the provisions of Part VI. As amended March 19, 1958, effective July 1, 1958."

2. The Court was apparently misled and erroneously applied Florida Appellate Rule 3.2 of Part III, which set forth the content of Notice of Appeal filed in Civil actions, instead of following Florida Appellate Rule 6.4 of Part VI, which does not require the book and page number of the book in which the judgment is recorded to be set forth in the Notice of Appeal filed in Criminal cases.

3. The Court apparently ignored or overlooked Florida Appellate Rule 3.9, sub-paragraph "c" of Part III, which has no counterpart in Part VI of the rules which provides in part:

> Time For. Every motion on behalf of an appellee to quash or dismiss an appeal, to strike the record or any portion thereof shall be filed, and a copy thereof served upon the opposite party, on or before the day *the appellee is required to file his brief.*

4. The Court apparently overlooked the fact that the State in this case did not file its Motion to Dismiss until after the time for filing their brief had expired for more than four (4) days, and overlooked the fact that the filing of the brief and the time it was filed by the Appellant was

in agreement with the Prosecuting Attorney and that the Motion for extension of time was filed merely as a precautionary measure which led to the subsequent agreement between the petitioners and the State to avoid the necessity of a hearing.

WHEREFORE, petitioner prays that the Court grant a rehearing in this matter, which would allow Counsel for Appellants to examine the records before the Court and to present any law touching upon the matters involved herein. This action is necessary because of the Court's Order of Dismissal which indicated that the dismissal is also based upon a consideration of the case on its merits.

/s/ ERNEST D. JACKSON, SR.,
Ernest D. Jackson, Sr.,
Attorney for Petitioner,
410 Broad Street, Suite No. 208
Jacksonville, Florida.

I HEREBY CERTIFY that a copy hereof has been furnished to GORDON G. OLDHAM, JR., State Attorney, Room No. 1, Kilgore Building, Leesburg, Florida, by U. S. Mail, this 8th day of September, 1962.

/s/ ERNEST D. JACKSON, SR.,
Attorney.

APPENDIX G

Orders of the Florida Supreme Court Dismissing Appeals*

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1963

MONDAY, OCTOBER 21, 1963

HERBERT EBENEZER CALLENDAR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 32,648

This cause coming on this day for consideration, it is ordered ex mero motu that the appeal filed in this cause in the District Court of Appeals, First District of Florida, on April 9, 1963, be and the same is hereby dismissed.

A True Copy

TEST:

GUYTE P. MCCORD,
Clerk Supreme Court.

*The orders are identical in all cases.

APPENDIX H

Orders of the Florida Supreme Court Denying Petitions for Rehearing*

IN THE SUPREME COURT OF FLORIDA
JULY TERM A.D. 1963

TUESDAY, DECEMBER 3, A.D. 1963

HERBERT EBENEZER CALLENDAR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 32,648

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,

ATTEST:

GUYTE P. MCCORD,
Clerk Supreme Court.

(I have today mailed to the Clerk of the District Court of Appeal, First District, Order of October 21, 1963, dismissing appeal in the above cause.)

*The orders are identical in all cases.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 2 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

NO. 58

HERBERT E. CALLENDER,
JAMES O'CONNOR, and
LESLIE LEE SMITH,

Petitioners,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JAMES W. KYNES
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Respondents.

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STATUTES

FEDERAL:

Title 28, United States Code, Section 1257 (3) 2

FLORIDA:

Section 79.10, Florida Statutes 6, 12

Article V, Section 4 (2), Florida Constitution 7-8, 9-10, 12, 13, 14, 17

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 996

HERBERT E. CALLENDER,
JAMES O'CONNOR, and
LESLIE LEE SMITH,

Petitioners,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRITS OF CERTIORARI TO THE SUPPREME COURT OF FLORIDA

OPINION BELOW

Respondent concedes that there were no written opinions from any of the Florida appellate judiciary with regard to the cases of the three petitioners.

JURISDICTION

Petitioners' recitation of the prosecutive disposition of their respective cases is substantially as represented in their petition at page two thereof.

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code; Section 1257 (3) or under any other provision, at least for purposes of determining whether to decline an assumption thereof.

QUESTIONS PRESENTED

Respondent has no quarrel with the alleged questions at page three of their petition presented for this Court's consideration by the petition herein being discussed.

STATUTORY AND CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

Respondent likewise has no quarrel with the statutory and/or constitutional provisions alleged to be involved in this case as set out in their petition at page four thereof.

STATEMENT OF THE FACTS

Despite the fact that the resumé of the facts allegedly supported by the record in this case leave room for differences of interpretation in this case and do not actually contain all the pertinent evidence found therein, respondent will accept it as set out by petitioners in their brief at pages five through twelve.

Respondent will endeavor to demonstrate even to the satisfaction of petitioners (hopefully) that it does not matter what their statement of facts contains in light of the jurisdictional deficiencies which should make it improper and/or impossible for this Court to assume jurisdiction of this case.

REASONS FOR DECLINING TO GRANT THE WRITS OF CERTIORARI PRAYED FOR BY PETITIONERS

There can be no doubt but that this Court has long followed its self-imposed principle that it will decline to review the judgment of a state court when said judgment is based upon an adequate and independent non-federal ground—without regard to whether a federal question was involved. **Murdock v. Memphis,** 20 Wall. 590, 636; **Berea College v. Kentucky,** 211 U. S. 45, 53; **Fox Film Corp. v. Muller,** 296 U. S. 207.

Just as certain is it correct to say that once it has been made apparent that the state court judgment in question is in fact based upon a non-federal ground, this Court must then determine whether that ground was in fact adequate to support the judgment without regard to any conclusion of the federal question which may have been involved. **Staub v. Baxley**, 355 U. S. 313, 318-319; **N. A. A. C. P. v. Alabama**, 357 U. S. 449, 455.

The adequacy referred to above is met if said ground is (a) broad enough, (b) independent and (c) tenable.

The matter of the scope of the non-federal ground is discussed in the **Murdock** case, supra, and as well in **Eustis v. Bolles**, 150 U. S. 361, 370.

The independence of said non-federal ground is discussed extensively in the cases of **Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.**, 243 U. S. 157, 164; **Ivanhoe Irrigation District v. McCracken**, 357 U. S. 275, 290.

We terminally observe that the matter of whether said non-federal ground is a tenable one, especially in a case (similar to the one at bar) dealing with federally assured rights, is perhaps best illuminated by this Court's opinions in the cases of **Davis v. Wechsler**, 263 U.S. 22, 24; **N. A. A. C. P. v. Ala.**, supra.

In the case at bar, respondent vigorously contends that the action of the Florida Supreme Court sought

to be assailed by petitioners was in every way based upon a non-federal ground, which ground was independent of any federal question, was broad enough without reference to the federal question and was so tenable as to almost require this Court to conclude that said ground was adequate and therefore decline to grant review thereof.

In accord with the above, this Court has consistently held that it is essential to show that not only must the state court's decision rest on a federal question, but it must also appear that a decision as to such question was necessary to the state court's determination. **De Saussure v. Gaillard,** 127 U. S. 216, 8 S. Ct. 1053, 32 L. Ed. 125 and **Lynch v. New York ex rel. Pierson,** 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191. See also annotations in 100 L. Ed. 1200, 1203 and 84 L. Ed. 925, 935, et seq.

Quite apart from the fact that the decision of the Supreme Court of the State of Florida denying petitioners review by appeal in nowise turned on or was concerned with either a federal question or an issue of federally assured due process, even if it had been so colored, it is axiomatic that this would not **per se** constitute a valid basis upon which petitioners could now complain. In this regard, the Court's attention is invited to its own pronouncements anent this matter.

Pierce v. Somerset Railway, 171 U. S. 641, 19 S. Ct. 64, 43 L. Ed. 316; **Leonard v. Vicksburg, Shreveport and Pacific Railroad Company,** 198 U. S. 416, 25 S. Ct. 750, 49 L. Ed. 1108; **Utley v. City of St. Petersburg, Florida,** 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155; **Lynch v. New York ex rel. Pierson,** supra; **Brooks v. Missouri,** 124 U. S. 394, 8 S. Ct. 443, 31 L. Ed. 454; **Buck v. California,** 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775. See also annotations, 100 L. Ed. 1200, 1203-6; 84 L. Ed. 925, 940, et seq.

Moreover, this Court has indicated that it will decline to review decisions of state courts where it appears that the person complaining of an alleged violation of some right under the Federal Constitution has by his own acts or omission to act waived such right. **Pierce v. Somerset Railway,** supra; **Leonard v. Vicksburg, Shreveport and Pacific Railroad Company,** supra.

The basic pronouncements to be found in the immediately aforementioned decisions of this Court were brought forth and galvanized in the realm of criminal law by this Court's own recent decision in the case of **Durley v. Mayo,** 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806, in which it concluded that the Florida Supreme Court, in denying the petitioner relief by habeas corpus, rested its decision on adequate state grounds; they being respectively statutory **res adjudicata (Section 79.10, Florida Statutes)** and substantive or case law **res adjudicata (Washington v. Mayo,** Fla. 77 So. 2d 620, 621).

That either or both of the bases for the application of that doctrine by the Supreme Court of Florida was an adequate state ground in this Court's view needs no further saying.

In the instant proceedings, we are concerned neither with a statutory pronouncement nor with some case law intepretation of a principle of state law, but rather with the undeniable fact that the Supreme Court of Florida simply did not have jurisdiction to grant review by appeal to petitioners.

Nor need this Court consider that the Supreme Court of Florida might have rested its order of dismissal on an adequate state ground as was the case in **Durley v. Mayo,** supra. It may be categorically stated and respondent so does, that the order of the Supreme Court of Florida in question was in fact founded upon state grounds which are conclusively adequate.

ARGUMENT

In the instant proceedings we need only concern ourselves with what is the highest form of law to which one can turn in the State of Florida; a constitutional provision, to-wit: **Article V, Section 4 (2),** the pertinent provisions of which read as follows:

"§ 4. **Supreme Court**

* * *

"(2) **Jurisdiction**

* * *

"Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. * * *"

The matter quoted above, was adopted as a constitutional amendment in the general election held on November 6, 1956, to take effect on July 1, 1957. By its advent, the people of the State of Florida approved the precise manner and mode in which all litigants must seek appellate review in the Supreme Court of Florida. This effectively supplanted all other means by which that review could theretofore be secured. At this writing, the procedure delineated therein remains inviolate.

It should be clear that Section 4, supra, neither says nor contemplates that litigants who feel themselves aggrieved by some judicial pronouncement are free to run helter-skelter to any court that may happen to suit their fancy with a cavalier disregard for a constitutional amendment which specifically spells out not only when and if but as well, where an appeal shall be perfected.

The provisions of Article V, Section 4 (2), supra, are a constitutional commandment created by the citizens of the State of Florida binding on everyone touched thereby in every sense of the word. The article in question deprives no one of review no matter what his

circumstances—it rather brings into focus that which theretofore may have been nebulous. Its pertinent provisions spell out the precise bases upon which a litigant aggrieved by a decision of a district court of appeal may seek review in the Florida Supreme Court (specifically by appeal).

We note that it could not be urged (indeed petitioners specifically did not) that the district court of appeal (by its per curiam denial of certiorari) initially passed upon the validity of a state statute.

Nor could it be urged (indeed petitioners specifically did not) that the district court of appeal (by its per curiam denial of certiorari) initially passed upon the validity of a federal statute.

Nor could it be urged (indeed petitioners specifically did not) that the district court of appeal initially passed upon the validity of a federal treaty. Respondent here notes that no federal treaty is in anywise connected with any aspect of this case from its birth to this date.

En fine, we contend that it certainly could not be urged (indeed petitioners specifically did not) that the district court of appeal (by its per curiam denial of certiorari) intially construed a controlling provision of either the Florida or Federal Constitution.

So it was that petitioners were faced with the constitutional requirement impressed upon them (Article

V, Section 4 (2)) that required a specific assertion that either of the several enumerated prerequisites in fact occurred (of course supported by record evidence thereof in order to secure review in the Florida Supreme Court by appeal. That they have not done that which all litigants must do who seek such review is, we submit, beyond cavil.

The record furnished by petitioners and particularly their pleadings and brief in support of their position demonstrates an absolute failure to prove, claim, allege or even show any interest in a review of the district court's per curiam opinion under the appropriate provisions of **Article V, Section 4 (2)**, supra. That such specifics are absolutely required in order to seek review by appeal in the Florida Supreme Court is beyond question. With reference to this constitutional requirement setting out the jurisdiction of the Florida Supreme Court to review district courts of appeal by appeal, it can be said that the Florida Supreme Court has, from time to time, been required to edify the bar of the State of Florida by repetitious and occasionally exhaustive opinions anent the point.

Certainly the most penetrating is the case of **In Re Kionka's Estate**, (Fla.), 121 So. 2d 644; an illuminating opinion wherein the Florida Supreme Court determines the circumstances under which it can and will review (on appeal) a decision of a district court of appeal. In so doing, it merely recites and interprets purely Florida law governing appellate procedure in this state. To substantially the same effect are the

cases of **State v. Furen**, Fla., 118 So. 2d 6; **Engel v. City of North Miami**, Fla., 115 So. 2d 1; **Bluesten v. Florida Real Estate Commission**, Fla., 125 So. 2d 567; and **City of Miami Beach v. State**, Fla., 111 So. 2d 437, 438.

Respondent notes that in the **City of Miami Beach** case, supra, the Florida Supreme Court said the following:

> "Upon consideration of the matter and an examination of the record and briefs in said causes, we fail to find that the subject decision of the District Court of Appeal initially passed upon the validity of any of the statutes and that, therefore, this Court is without jurisdiction to entertain the appeal and the same is hereby dismissed **ex mero motu.**" (Emphasis supplied)

This Court should quickly note that that is precisely the disposition which the Florida Supreme Court made of petitioners' appeal.

Based on the matters set out above with reference to the constitutional requisites imposed on litigants seeking a review by appeal in the Florida Supreme Court, it is respectfully submitted that the human imagination could not envisage a situation with less legitimate basis for seeking review by appeal than that which petitioners lamely presented to the Florida Supreme Court.

Returning to this Court's decision in the **Durley** case, supra; we find the legal fiction of **res adjudicata** as embodied in **Section 79.10**, supra, and Florida case law, to-wit: **Washington v. Mayo**, supra, neither one of which being possessed of the stature of a constitutional amendment; was considered by this Court as an adequate state ground upon which the Florida Supreme Court could summarily dismiss Durley's petition for habeas corpus.

It is therefore certainly no departure and indeed not even a step forward to conclude that the compulsion of a constitutional amendment prescribing just how Florida litigants in Florida cases involving Florida law (federal law only incidently as it may be raised) shall proceed to seek review in the Supreme Court of Florida by appeal is even more apparent.

The almost basic English pronouncements of **Article V, Section 4 (2)**, supra, do not present an obtuse writing incapable of being deciphered. No mystical qualities attach to it nor is it shrouded in doubt. It is simply a mandatory requirement which applies without exception to all who seek to come thereunder. Ergo, the Supreme Court of Florida in dismissing the appeal in this cause merely took notice of a complete failure or, as the case may be, refusal, by or on behalf of petitioners to proceed in conformity therewith.

If it be urged (petitioners do not) that the Florida Supreme Court should have treated their improper

attempt at appeal as a petition for certiorari, there is perhaps even less basis upon which they may complain here. The appropriate section of **Article V, Section 4 (2)**, supra, carefully and clearly delineates the procedure to be followed by litigants seeking certiorari review in the Florida Supreme Court from a decision of a district court of appeal. That provision reads as follows:

"§ 4. **Supreme Court**

* * *

"(2) **Jurisdiction.**

* * *

". . . The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

At the outset, respondent deems it appropriate to acknowledge that the district court of appeal rendered per curiam decisions without opinion. On the several occasions wherein the Florida Supreme Court has been asked to review a per curiam decision without opinion they have, almost without exception, consistently re-

fused to extend such review for a multitude of reasons, all of them constitutionally embedded.

A pungent rejection of appellate liberality in cases where review was sought of a per curiam decision without opinion, was rendered by the Florida Supreme Court in the case of **Carmazi v. Board of County Commissioners,** (Fla.), 104 So. 2d 727. Mr. Justice Drew, specially concurred, quoted from the case of **Thompson v. State,** 199 Ga., 250, 33 S. E. 2d 903, and concluded that the construction contemplated by our Constitution **(Article V, Section 4 (2)**—as quoted above) did not include the mere application of facts to constitutional provisions, but rather required such construction as would at least touch on the meaning of some provision of the Constitution directly in question—precisely what neither the trial court, circuit court nor the district court of appeal in this case were required to or did in fact do.

It should be clear that a per curiam decision without opinion such as petitioners sought to have reviewed by the Florida Supreme Court did not affect a class of constitutional or state officers. It should be equally clear that that same decision did not pass upon a question certified by said district court of appeal to be of great public interest. It seems inconceivable that petitioners could possibly urge that said decision was in direct conflict with a decision of another district court of appeal or of the Florida Supreme Court on the same point of law.

These jurisdictional prerequisites which must be alleged in a well-drawn petition intentionally requesting certiorari, if said petition is to be considered by the Florida Supreme Court, are at least as necessary to, and in fact are prerequisites imposed on parties improvidently seeking review in that court by appeal. To hold otherwise would invite mislabelled or misdirected appellate pleadings thereby requiring the Florida Supreme Court to not only read the entire record but conclude for the petitioners what they should have said in order that it in turn could consider whether to grant a particular form of review. This becomes a case of the tail wagging the dog.

Respondent is not yet acquainted with any judicial pronouncement in this land which requires the highest state court to plead correctly for petitioners who were represented by well-qualified and able counsel (of their own choosing) who specifically elected or refused as the case may be, to proceed in the manner directed by the Constitution of the State of Florida.

There are a host of cases in which the Supreme Court of the State of Florida has justified declining to review a per curiam decision of a district court of appeal by certiorari. The first of these is the case of **Lake v. Lake**, Fla., 103 So. 2d 639. The decision in the **Lake** case, supra, should be dispositive of this aspect of the matter before this Court. The principle an-

nounced by the **Lake** case, supra, is ably supported by the Supreme Court's opinion in the case of **South Florida Hospital Corporation v. McCrea,** Fla., 118 So. 2d 25, 27, when it said the following:

"At the risk of being tedious, we will again reiterate that unless we find a conflict in decisions of other appellate courts of this state on the point or points of law pronounced in the opinion of the District Court of Appeal in this case, we have no power or jurisdiction in any manner to disturb the judgment of the lower court. Courts of Appeal are and were meant to be courts of final appellate jurisdiction in the vast majority of cases, and in cases such as the one at bar it is only to harmonize and standardize decisions that this court may presume to interfere. As said by Mr. Justice Thomas in Lake v. Lake, supra:

"'Sustaining the dignity of the decisions of the district court of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case'.

"We therefore initially refrain from scrutinizing the action of the trial court or of the Court of Appeal as to the effect on the parties to the cause.

> If what was decided finds no contradiction in what this court or another District Court has said in their official pronouncements on the same point or points of law, then our authorized examination is complete and the writ of certiorari will be discharged. If there is contradiction we will undertake to resolve the conflict."

See also **Ansin v. Thurston**, Fla., 101 So. 2d 808; **Seaboard Airline Railroad Company v. Branham**, Fla., 104 So. 2d 356, and **Hakam v. City of Miami Beach**, Fla., 108 So. 2d 608.

So it is that petitioners; confronted with the unequivocal notation of the district court of appeal rendered on February 26, 1963, as follows:

"PER CURIAM.

Certiorari denied."

were constitutionally bound to follow the specific requirements of **Article V, Section 4 (2)**, in seeking only that review to which they were in fact entitled. Viewed within the framework of the certiorari which they never sought, it can be said, based upon the above, that they could make no legitimate claim for review in that fashion. Certainly their pleadings could never be said to have limmed the specific requirements of the aforesaid constitutional amendment with reference to appeals from the district courts of appeal.

CONCLUSION

Based upon the aforesaid, it conclusively appears that the petition for writs of certiorari requesting this Court's intercession should be denied.

Respectfully submitted,

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Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to Petition for Writs of Certiorari to the Supreme Court of Florida to the Honorables Carl Rachlin, Floyd McKissick, Charles Oldham, Webster Sweet, Ernest Finney, 38 Park Row, New York, New York, and Ernest Jackson, 410 Broad Street, Suite No. 208, Jacksonville, Florida, counsel for the petitioners, by mail, this ____ day of June, 1964.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Respondent.